bears his own costs in respect of this Appeal only *AND IT IS LASTLY ORDERED* that the sum of $500.00 deposited into Court by the Appellant as security for costs of this Appeal be refunded to the Appellant.

GIVEN under my hand and the Seal of Court dated this 5th day of December, 1985.

Sd. Soo Ai Lin
Senior Assistant Registrar
Supreme Court Malaysia
Kuala Lumpur

Solicitors: *Syarikat Kam Woon Wah; Arthur Lee & Co.*

LAI SOON CHEONG v. KIEN LOONG HOUSING DEVELOPMENT SDN. BHD. & ANOR.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) February 27, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 338 of 1985]

Land Law – Agreement for purchase of land and house with housing developer – Condition that vendor shall not without prior approval of purchaser subject the land to any other further encumbrance – Vendor charging the land without approval of purchaser – Foreclosure proceedings instituted by chargee – Application for specific performance of sale and purchase agreement – Application for injunction to restrain respondents from proceeding with sale of land – Allegation of fraud to defeat indefeasible title of chargee – Application for interim injunction allowed.

In this case the appellant had entered into a sale and purchase agreement with the first respondent, a housing developer, for the purchase of a house for $163,910 and had paid a total sum of $74,410 towards the purchase price. It was provided in the agreement that after the execution of the agreement the vendor shall not without the prior approval of the purchaser subject the land to any further encumbrance. The first respondent, however, charged the land to the second respondent. When the first respondent failed to repay the loan to the second respondent, the second respondent instituted foreclosure proceedings and the Senior Assistant Registrar of the High Court directed the sale of the land. The appellant applied (a) for an order of specific performance of the sale and purchase agreement (b) for an injunction to restrain the respondents from proceeding with the sale of the land and (c) for a declaration that the charge registered was void wholly or in respect of the lot agreed to be sold to the appellant. The appellant applied for an interim injunction to restrain the respondents from selling the land by public auction. The learned judge dismissed the application. The appellant appealed.

Held, allowing the appeal: in this case the appellant had a perfectly legitimate right to pursue his remedy. He has paid a substantial sum of the purchase price. He has also alleged fraud and has set out particulars of the fraud allegedly perpetrated against him by the first and second respondents and he seeks to defeat the indefeasible title of the second respondent on these grounds. He is also asking for specific performance of the sale and purchase agreement against the first respondent. In the circumstances he should be allowed an opportunity to prove his allegations.

Cases referred to:

(1) *Tai Lee Finance Co. Sdn. Bhd.* v. *Official Assignee & Ors.* [1983] 1 M.L.J. 81.
(2) *Public Finance Bhd.* v. *Narayanasamy* [1971] 2 M.L.J. 32.

SUPREME COURT.

C. Abraham (*David Morais* and *K. Chandran* with him) for the appellant.

Tan Bu Kian for the respondent.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): The first respondent is a housing developer. On May 4, 1981 the appellant having paid a total sum of $74,410.00 towards the purchase price of a house ($163,910.00) entered into a sale and purchase agreement with the first respondent in respect of land Lot No. 4042 under Document of Title No. H.S.(D) B/P 56/80 in the Mukim of Ulu Bernam Timur. Clause 16 of the agreement states expressly that after the execution of the agreement the vendor *shall not without the prior approval of the purchaser* subject the said land or the said lot to any further encumbrance other than those already subsisting on the date of agreement if any. At the material time the whole land was already charged to Magnum Finance Berhad under Presentation No. 8062/80, Jilid 964, Folio 4 and registered on May 24, 1980. On February 3, 1982 the second respondent paid Magnum Finance Berhad the redemption sum of $1,168,792.70 to obtain the documents of title and the first respondent then executed a charge in favour of the second respondent which was registered on February 11, 1982 vide Presentation No. 2052/82, Jilid 1219, Folio 38. Subsequently a second charge was created by the first respondent on the same land including Lot 4042 in favour of the Development and Commercial Bank Berhad vide Presentation No. 6466/82 Volume No. 1253, Folio No. 47 registered on April 20, 1982. When the first respondent failed to repay the loan to the second respondent after the statutory demand made in Form 16E of the

National Land Code, the second respondent instituted foreclosure proceedings and obtained an order for sale by public auction of the said land. The Senior Assistant Registrar of the High Court directed the sale to take place on August 11, 1984.

On July 31, 1984 the appellant filed a writ with an endorsement of claim applying for an order of specific performance of the sale and purchase agreement against the first respondent and an injunction restraining both respondents, their servants and or agents from proceeding with the sale of the said land. The appellant also sought for a number of declarations including a declaration that the charge registered on April 20, 1982 vide Presentation No. 6466/82 is null and void wholly or in respect of the said particular lot No. 4042.

In his pleadings the appellant made a number of allegations. He alleged that the first respondent committed breach of Clause 16 of the agreement by dishonestly and fraudulently charging the land and also alleged that the second respondent had direct or implied knowledge of the breach and yet proceeded with the charging of the land. Particulars of fraud are set out in his pleadings.

On the same day that the writ was filed the appellant applied by summons in chambers for an interim injunction to restrain the respondents from selling the land by public auction which was scheduled to proceed on August 11, 1984. In opposing the application the second respondent denied knowledge of all the allegations contained in the appellant's affidavit and in particular denied knowledge of any sale and purchase agreement and also contended that the application for the injunction was in any case misconceived because the second respondent was not party or privy to the agreement. The second respondent also contended that since the appellant had failed to lodge a private caveat until after the charge was registered he should not be allowed to obtain an injunction to protect his alleged interest.

The learned judge dismissed the application for the injunction. The appellant appealed. We allowed the appeal with costs here and below for the following reasons.

It would appear from his grounds of decision that the learned judge relied on two main grounds for his refusal to grant the injunction. First, he said the second respondent was not party or privy to the sale and purchase agreement between the appellant and the first respondent. He felt that the auction sale should go on because "the plaintiff's cause of action in any event was against the first defendant and not the second defendant" (page 39). Secondly, he said all the other purchasers in regard to the other 24 lots of the land were agreeable to the auction taking place on the undertaking of the second respondent to repay to each of them 10% of the purchase price from the proceeds of the sale without regard to priorities.

In our view both these grounds cannot be sustained.

Counsel for the respondents would seem to have relied mainly on *Tai Lee Finance Co. Sdn. Bhd.* v. *Official Assignee & Ors.*[1] to support his case. I can only presume that counsel was relying on the result of the appeal in that case where the application for an order for sale of the land was allowed. In *Tai Lee Finance* the proprietress of the land executed two separate charges in favour of the appellant to secure the repayment of two loans of $90,000 and $20,000 respectively. Both charges were registered. Notice in Form 16E under the National Land Code was given to the chargor who failed to comply. Thereupon the chargee applied for an order for sale of the land and obtained the order in default of appearance. However, the order was subsequently set aside. The chargee's application was heard again and the order for sale was granted. However, on appeal to the Federal Court, the order was set aside and it was ordered that the case be remitted back to the High Court for the application to be heard in open court. When the application was heard again it was dismissed. In that case the chargor was also a land developer who had entered into agreements with respondents 2 to 7 to build houses for them. The respondents opposed the chargee's application for an order of sale on the grounds that the appellant had failed to make proper enquiries as regards the land and the building erected thereon before the execution of the charges.

Tai Lee Finance is clearly distinguishable in that the court was asked to determine whether there was fraud on affidavit evidence whereas in the instant case the issue of fraud is to be determined on the evidence to be adduced at the trial yet to come. In *Tai Lee Finance* the appeal was allowed because the Federal Court found on affidavit evidence that "at the very most the appellant had constructive notice of the respondents'

prior beneficial interests."

Public Finance Bhd. v. *Narayanasamy*[2] also dealt with an application for the sale of land charged to recover the principal and interests due. Three of the sub-purchasers applied to be added as respondents in the application for order of sale. The object of the sub-purchasers was to claim ownership of 45 acres of the land and to have the same excluded from any order of sale made by the court. The finance company opposed the intervention of the sub-purchasers and contended that they need not pay any regard whatsoever to the rights of the sub-purchasers. The learned judge there found that the finance company was guilty of fraud and collusion and dismissed the application. They appealed to the Federal Court but the appeal was dismissed. In the course of his judgment Ong C.J. set out the rights of the sub-purchasers in that case. Ong C.J. said at page 33:

"It is crystal clear that the object of these three sub-purchasers was to claim ownership of 45 acres in all and to have the same excluded from any order of sale made by the court. We have no doubt whatever in our minds that they are entitled to a decree of specific performance against the respondent. They had fulfilled their part of the contract and nothing remains but for the respondent to execute transfers to them when separate titles are issued."

The Chief Justice also said:

"It was argued that, had any of them paid up in full at the time of execution of the charge, their case might have been unanswerable. The simple answer is that the appellants were aware of their inchoate rights against the respondent and that completion by them in due course may be fully expected by reason of the substantial sums already paid. What matters is that at the time the appellants applied for an order of sale the three sub-purchasers were beneficial owners of their 45 acres. By their intervention they merely asked that their legal rights should be recognised."

The Federal Court in *Public Finance Bhd.* held that the finance company's insistence that the sub-purchasers had no rights whatsoever except a right to damages for breach of contract is "so plainly unconscionable" (page 33).

Coming back to the instant case it is immaterial in our view that purchasers of the other lots had agreed to the sale of the land subject to their being refunded a certain amount of the purchase money. The appellant has a perfectly legitimate right to pursue his remedy. He has paid a substantial sum of the purchase price. He has alleged fraud and has set out particulars of the fraud allegedly perpetrated against him by the first and second respondents and he seeks to defeat the indefeasible title of the second respondent on those grounds. He is also asking for specific performance of the sale and purchase agreement against the first respondent. The least we can do is to allow him the opportunity to prove his allegations.

Appeal allowed.

Appeal allowed.

Solicitors: *K. Chandran & Co.; Sothi & Ang.*

PUBLIC PROSECUTOR v. JAMALUL KHAIR

[R. Cr. J. (Gunn Chit Tuan J.) August 20, 1984]

[Kuala Lumpur – Federal Territory Criminal Revision No. 7 of 1984]

Criminal Law and Procedure – Plea of guilty recorded – Withdrawal of plea before sentence – Whether President functus officio – Revision – Penal Code, ss. 324 & 354 – Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(m)(2) & 183(ii).

In this case, the accused was charged in the Sessions Court for two offences under sections 324 and 354 of the Penal Code. He pleaded guilty to both charges. His pleas were recorded and he was found guilty on both charges and convicted accordingly. Sentence was postponed at the request of the accused. On the day fixed for sentence, he informed the court that he wished to withdraw his pleas of guilty because they were not made voluntarily. The learned President accepted the reasons given by the accused and allowed him to withdraw his pleas of guilty. Thinking that she might have erred, she sent the record to the learned Judge for revision.

Held: (1) if a court upon all the facts before it thinks it is proper to accept a plea of guilty then the court may permit that plea to be withdrawn and a plea of not guilty accepted at a later stage up to sentence, that is, until final adjudication. The learned President was not *functus officio* in this case until she had passed a sentence or had otherwise finally adjudicated the matter;

(2) there was no need for any order of revision. The President should proceed to try the case.

[*Editorial Note:* The Public Prosecutor applied by notice of motion to the Federal Court (Application No. 15 of 1984) for leave to refer the following question of law of public interest for determination under section 66 of the Courts of Judicature Act, 1964: "Whether a Court can, in law, allow an accused person to withdraw his plea of guilty in respect of a charge which was explained and understood by him and upon whose plea of guilty he was duly convicted by the Court." On October 15, 1984, the Federal Court